

1 KENDALL BRILL & KLIEGER LLP  
Richard B. Kendall (90072)  
2 *rkendall@kbbfirm.com*  
Philip M. Kelly (212714)  
3 *pkelly@kbbfirm.com*  
Ashlee R Lynn (261002)  
4 *alynn@kbbfirm.com*  
10100 Santa Monica Blvd., Suite 1725  
5 Los Angeles, California 90067  
Telephone: 310.556.2700  
6 Facsimile: 310.556.2705

7 Attorneys for Plaintiff-in-Interpleader

8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION  
10

11 HACHETTE BOOK GROUP, INC.,  
12 Plaintiff-in-Interpleader,  
13 v.  
14

WINDBLOWN MEDIA, INC. a  
15 California Corporation; WAYNE  
JACOBSEN; BRAD CUMMINGS;  
16 WILLIAM PAUL YOUNG,

17 Defendants-in-  
18 Interpleader.  
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Case No. CV10-03534 JFW (JCx)

**PLAINTIFF HACHETTE BOOK  
GROUP, INC.'S OPPOSITION TO  
DEFENDANT YOUNG'S MOTION  
TO DISMISS**

The Honorable John F. Walter

Date: July 19, 2010  
Time: 1:30 p.m.  
Courtroom: 16

*[Filed concurrently with the  
Declaration of Philip M. Kelly]*

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1 **I. INTRODUCTION**

2 Defendant-In-Interpleader William Paul Young has moved to dismiss the  
3 Complaint-In-Interpleader of Hachette Book Group, Inc. (“Hachette”), arguing that  
4 this Court should take the extraordinary step of surrendering its jurisdiction over this  
5 federal interpleader action (the “Interpleader Action”) pursuant to the *Younger* or  
6 *Colorado River* abstention doctrines because a related action is pending in state  
7 court. As detailed below, Young satisfies neither the exacting requirements for  
8 abstention under *Younger* nor the “exceptional circumstances” for abstention under  
9 *Colorado River*. Jurisdiction in this Court is therefore proper, and Young’s motion  
10 should be denied.

11 Hachette has interpleaded \$990,182.35 with this Court that is to be allocated  
12 between Defendants-In-Interpleader Young, Windblown Media, Inc.  
13 (“Windblown”), Wayne Jacobsen, and Brad Cummings. As a result of numerous  
14 disputes between the parties—evidenced by the pending state and federal actions—  
15 the Defendants-In-Interpleader have competing claims to these funds. In light of  
16 these adverse claims, Hachette has a real and reasonable fear that distributing the  
17 funds would expose Hachette to multiple claims and liabilities and has thus availed  
18 itself of the federal interpleader statute, 28 U.S.C. § 1335, which confers jurisdiction  
19 on this Court to resolve actual and potential adverse claims to the funds and to avoid  
20 the vexation of multiple lawsuits by resolving all claims to particular funds in one  
21 proceeding. *See Texas v. Florida*, 306 U.S. 398, 406–07 (1939); *In re Republic of*  
22 *Philippines*, 309 F.3d 1143, 1153 (9th Cir. 2002).

23 The fact that related actions are pending in state and federal courts does not  
24 divest this Court of jurisdiction over the Interpleader Action. Rather, where state  
25 and federal courts have concurrent jurisdiction over related matters, the general rule  
26 is that “the pendency of an action in the state court is no bar to proceedings  
27 concerning the same matter in the Federal court having jurisdiction.” *Colorado*  
28 *River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). The

1 Supreme Court has explained that because federal courts have a “virtually  
 2 unflagging obligation” to exercise the jurisdiction conferred on them, abstention is  
 3 appropriate only under exceptional circumstances. *Id.*; *see also Snodgrass v.*  
 4 *Provident Life & Accident Ins. Co.*, 147 F.3d 1163, 1167–68 (9th Cir. 1998).

5 The facts of this case simply do not justify abstention. First, the mere  
 6 existence of a state court contract dispute with some overlapping parties and claims  
 7 is insufficient to warrant the extraordinary measure of staying or dismissing a case  
 8 under the *Younger v. Harris*, 401 U.S. 37 (1971), abstention doctrine. Rather, the  
 9 *Younger* doctrine has been very narrowly construed, and abstention is only  
 10 appropriate where the state action involves an interest vital to the operation of the  
 11 state government. *See, e.g., Mobil Oil Corp. v. City of Long Beach*, 772 F.2d 534,  
 12 542 (9th Cir. 1985). The issues bearing on allocation of the interpleaded funds  
 13 clearly do not implicate any vital state interest. Young’s outlandish contention that  
 14 a vital state interest is implicated merely because the disposition of the interpleaded  
 15 funds hinges on issues of state contract law, some of which are also presented in a  
 16 pending state action, is certainly wrong: if it were that easy to invoke *Younger*  
 17 abstention, then abstention could be invoked in favor of pending state proceedings  
 18 in every diversity or supplemental-jurisdiction case. Moreover, Young cannot  
 19 satisfy the additional requirements for *Younger* abstention: (i) the state court  
 20 proceeding would not provide Hachette with an adequate opportunity to raise its  
 21 federal interpleader claim; and (ii) this Interpleader Action would not have the effect  
 22 of enjoining the state court proceeding.

23 Young’s argument that the *Colorado River* doctrine justifies abstention is  
 24 similarly without merit. Here, the state court proceeding is not even the type of  
 25 “parallel” proceeding that would merit a *Colorado River* abstention analysis. And,  
 26 even if the *Colorado River* doctrine did apply, a balancing of the seven *Colorado*  
 27 *River* factors—particularly in light of the heavy weight to be accorded in favor of  
 28 this Court’s jurisdiction—requires that Young’s motion to dismiss be denied.

## II. FACTUAL AND PROCEDURAL BACKGROUND

### A. *The Shack And The Formation Of Windblown Media*

Defendants-in-Interpleader Wayne Jacobsen and Brad Cummings are both California-based former pastors, authors and counselors. First Amended Complaint of Jacobsen and Cummings (hereinafter the “Federal FAC”) ¶ 6. In December 2005, Defendant-in-Interpleader William Paul Young, a resident of Oregon City, Oregon, sent Jacobsen a copy of an unpublished Christian manuscript he had written and solicited Jacobsen’s and Cummings’ help in rewriting the manuscript. First Amended Complaint-In-Interpleader (“Interpleader”) ¶ 2; Federal FAC ¶ 7.

Throughout much of 2006 and into 2007, Young, Jacobsen, and Cummings rewrote the manuscript into the novel ultimately entitled *The Shack* (hereinafter the “Book”). Federal FAC ¶ 12. Jacobsen contacted a number of people he knew in the publishing industry in an attempt to find a publisher for the book. *Id.* ¶ 13. When no publisher was interested in publishing the Book, Young, Jacobsen, and Cummings agreed that Jacobsen and Cummings would form a publishing company to publish the Book and other works by Jacobsen and Cummings. *Id.* Accordingly, in 2007, Jacobsen and Cummings formed Defendant-in-Interpleader Windblown Media, Inc. (“Windblown”). *Id.*

Windblown and Young entered into an oral publishing agreement in or around 2007 by which they agreed that Windblown would publish the Book. Interpleader ¶ 16. Under the terms of this oral agreement, Windblown alleges that Young would receive a \$.50 per paperback/\$1.00 per hardback royalty for each copy of the Book sold. *Id.* Windblown would then set aside fifty percent of the revenue received in connection with the Book as “profits” to be shared equally among the Book’s co-authors, with Young, Jacobsen, and Cummings each receiving one-third of those profits. *Id.* The remaining fifty percent of the revenue received from the exploitation of the Book was set aside for Windblown’s operating capital. *Id.*

**B. Young, Jacobsen, And Cummings Seek Fulfillment Services For The Book And Enter Into The Windblown-Young Agreement**

As Windblown's sales of the Book approached one million copies, Young, Jacobsen, and Cummings agreed that Windblown should seek a larger publishing house with the ability to provide fulfillment and related services to meet the overwhelming demand for the Book. *Id.* ¶ 17; Federal FAC ¶ 23. It was as a result of this decision that Windblown came into contact with Hachette, one of the nation's top book publishers and distributors. Interpleader ¶ 17. Young was actively involved in and approved Windblown's decision to enter into a contract with Hachette to provide fulfillment services for the Book. In doing so, Young, along with Cummings and Jacobsen, realized that they would be surrendering up to one-half of the profits from the book to Hachette. *Id.*; Federal FAC ¶ 30. Jacobsen, Cummings, and Young discussed at length the fact that if Windblown were to contract with Hachette, Young, Jacobsen and Cummings would each receive one-sixth rather than one-third of the profits from the Book, with the upside being that there would be a higher volume of sales and the Book would reach a much larger audience. Interpleader ¶ 17; Federal FAC ¶ 32. Young fully understood that he would not be entitled to receive a share of Hachette's profits in connection with the Book. *Id.*

Young, Jacobsen, and Cummings agreed that before entering into an agreement with a third party fulfillment service provider, Windblown and Young would enter into a written publishing agreement. *Id.* ¶ 18; Federal FAC ¶ 24. Accordingly, Young, on the one hand, and Jacobsen on behalf of Windblown, on the other hand, negotiated and jointly drafted the Windblown-Young Agreement dated May 10, 2008. Interpleader ¶ 19; Federal FAC ¶ 24. The Windblown-Young Agreement provides that Young would receive an author royalty of \$.50 per paperback/\$1.00 per hardback for each copy of the Book sold in the United States, along with one-third of the net profits received by Windblown from Hachette's sales

1 of the Book. Interpleader ¶ 19. For foreign sales of the Book and certain other  
 2 products, the author royalty rate is divided such that Young would receive 60%,  
 3 Jacobsen would receive 20%, and Cummings would receive 20%. *Id.* For copies  
 4 sold at a discount of 55% or greater off the retail price, premiums (defined as  
 5 promotional items not for individual resale), and copies sold as a result of  
 6 Windblown's direct marketing programs, the Windblown-Young Agreement  
 7 provides for author royalties of 10% of net sales revenue for hardcover and 5% for  
 8 all other editions. *Id.* Finally, Windblown acquired the merchandising rights to the  
 9 Book, and Young is to receive a royalty of 10% of the net sales revenue received by  
 10 Windblown in connection with such merchandising. *Id.*

11 Hachette was not a party to the Windblown-Young Agreement and was not a  
 12 participant in the negotiations between Windblown and Young concerning its terms  
 13 and conditions. *Id.* ¶ 20; Federal FAC ¶ 24.

14 **C. The Hachette-Windblown Agreement**

15 On May 13, 2008, Windblown and Hachette entered into the Hachette-  
 16 Windblown Agreement under which Hachette would provide fulfillment services for  
 17 the Book. Interpleader ¶ 21. The Hachette-Windblown Agreement provides that  
 18 Windblown will supply all information necessary for Hachette to compute author  
 19 royalties arising out of Hachette's sales and licenses under said agreement. *Id.* The  
 20 Hachette-Windblown Agreement further provides that Hachette is responsible for  
 21 reporting and sending certain author royalty payments directly to Young, Jacobsen,  
 22 and Cummings and reporting to Windblown the amounts due with respect to such  
 23 author royalty payments, all in accordance with information provided by  
 24 Windblown. *Id.*

25 The Hachette-Windblown Agreement requires that Hachette prepare a  
 26 quarterly "Statement" for the Book setting forth the "Net Copies" of the Book (the  
 27 number of copies shipped by Hachette minus actual and estimated returns) and  
 28 identifying the "Defined Proceeds." *Id.* ¶ 22. "Defined Proceeds" for the Book are

determined by calculating all Revenues received by Hachette minus all “Expenses” incurred by Hachette. *Id.* “Revenues” are defined as all monies received by Hachette from sales or licenses of the Book minus actual returns and a reasonable reserve against future returns, as well as any other monies actually received by Hachette relating directly to the Book. *Id.* “Expenses” are defined as certain enumerated out-of-pocket expenses incurred by Hachette, including author royalty payments to Young, Jacobsen, and Cummings and Hachette’s general distribution services fee (equal to 10% of net sales). *Id.*

If the quarterly Statement reveals a positive balance, the Hachette-Windblown Agreement provides that the Defined Proceeds should be divided in the following manner: Windblown receives 65% of the Defined Proceeds from the first million Net Copies, 60% of the next two million Net Copies, and 50% of all Net Copies thereafter, and Hachette receives the remainder of such Defined Proceeds. *Id.* ¶ 23.

Windblown then allocates the Defined Proceeds it receives under the Hachette-Windblown Agreement in accordance with the Windblown-Young Agreement, which requires Windblown to pay Young one-third of the net profits generated by the book for Windblown. *Id.* ¶ 24. Jacobsen and Cummings also receive a share of each Defined Proceeds payment. *Id.*

Once the Hachette-Windblown Agreement was in place, Hachette took over primary distribution of the Book around June 2008. *Id.* ¶ 25. The decision for Windblown to contract with Hachette proved to be enormously lucrative for Young. Federal FAC ¶ 34. After Windblown entered into the Hachette-Windblown Agreement, the Book made it to The New York Times bestseller list, where it has remained for over 100 consecutive weeks. *Id.* There are currently over 12 million copies of the Book in print. *Id.* To date, Young, a previously unknown and unpublished author, has personally received well in excess of \$10.7 million in royalties and profits from the Book, in addition to substantial additional monies he

1 has received from speaking engagements and other opportunities resulting from the  
2 Book. *Id.*

3 **D. Numerous Disputes Arise Between The Parties**

4 Jacobsen and Cummings contend that they collaborated to transform Young's  
5 manuscript into the Book. Interpleader ¶ 2. Unsatisfied with the credit received for  
6 their efforts, Cummings and Jacobsen filed an action against Young in the United  
7 States District Court for the Central District of California, Case No. CV10-3246-  
8 JFW (JCX) (hereinafter, the "Federal Court Action"), which seeks, among other  
9 things, a determination that Jacobsen and Cummings are co-authors of, and  
10 therefore have various economic rights in, the Book. *Id.* Jacobsen, Cummings, and  
11 Young also dispute in the Federal Court Action (as well as in a state court action, as  
12 discussed below) the interpretation of the agreements between the parties. *Id.* ¶ 3.

13 For his part, Young contends that he is entitled to significantly more money  
14 from the Book than he has been paid to date. Interpleader ¶ 6. Following the  
15 extraordinary success of the Book, Young hired an accounting firm to audit  
16 Windblown's books and records. *Id.* ¶ 26. After completing the audit, Young filed  
17 an action in Ventura County Superior Court, Case No. 56-2009-00362329-CU-BC-  
18 VTA (hereinafter, the "State Court Action"), against both Windblown and Hachette  
19 alleging, among other things, that he has not been paid a proper share of the Defined  
20 Proceeds and author royalties received by Windblown in prior time periods. *Id.* ¶ 6.  
21 Young has asserted that he has the right to have Hachette pay him the larger portion  
22 of Defined Proceeds and author royalties to which he claims he is entitled. *Id.*

23 Windblown, Jacobsen, and Cummings disagree with Young's contentions and  
24 assert that they have paid Young properly pursuant to the Windblown-Young  
25 Agreement. *Id.* ¶ 27. Hachette disagrees with Young's claims against Hachette in  
26 the State Court Action, including that Young is entitled to a share of Hachette's  
27 separate profits. *Id.* ¶ 6.

1 The State Court Action is still in the early stages. A substitute judge denied  
 2 Hachette's and Windblown's demurrers and motions to strike, but there have been  
 3 no rulings on the merits of the case. Mot. at 5; Declaration of Philip M. Kelly  
 4 ("Kelly Decl.") ¶ 2. Indeed, the substitute judge refused even to consider the  
 5 Hachette-Windblown Agreement, which was the basis for the defendants'  
 6 demurrers. *Id.* Discovery thus far in the State Court Action has been minimal.  
 7 Hachette has not served any discovery and has produced only one document in  
 8 response to a specific request from Young. Kelly Decl. ¶ 3. Windblown has served  
 9 minimal written discovery but has not produced any documents. Young has served  
 10 limited written discovery and produced less than a single box of documents. *Id.* No  
 11 depositions have been taken, and none are currently scheduled. *Id.* ¶ 4. The state  
 12 court has not set any discovery deadlines or a trial date. *Id.* ¶ 5.

13 **E. Hachette Has Interpleaded Funds To Be Split In Some Manner**  
 14 **Between Young, Windblown, Jacobsen, And Cummings**

15 Hachette was in possession of \$990,182.35, which constitutes Defined  
 16 Proceeds under the Hachette-Windblown Agreement for the quarter ending March  
 17 31, 2010 (hereinafter the "Funds"). The Funds are to be allocated in some manner  
 18 between Windblown, Jacobsen, Cummings, and Young. Interpleader ¶ 28.  
 19 Hachette filed its First Amended Complaint-in-Interpleader on June 3, 2010.  
 20 (hereinafter the "Interpleader Action.").

21 **F. This Court Ordered That The Funds Be Deposited With The Court**  
 22 **Clerk And The Court Has Taken Control Over The Funds**

23 On June 3, 2010, this Court ordered that the Funds be deposited with the  
 24 Clerk of the District Court for the Central District of California. Order Directing  
 25 Deposit of Funds Into Court Registry (Docket No. 17). On June 7, 2010, Hachette  
 26 deposited the Funds with the Clerk. Kelly Decl., ¶ 6.

1 **III. ARGUMENT**

2 **A. Federal Interpleader Is The Proper Procedure To Resolve The**  
 3 **Competing Claims To The Funds**

4 Windblown, Jacobsen, and Cummings assert that they are entitled to the full  
 5 amount of the Defined Proceeds owed under the Hachette-Windblown Agreement,  
 6 less an amount consistent with how Young has been paid by Windblown to date.  
 7 Interpleader ¶ 29. Young asserts that he is entitled to a greater share of the Defined  
 8 Proceeds than he has received to date, and his resulting action against Windblown  
 9 and Hachette makes clear that there is a genuine dispute as to what would constitute  
 10 a proper division of the Funds. *Id.* As a result, Windblown, Jacobsen, Cummings,  
 11 and Young have conflicting claims to the same Funds. *Id.*

12 In light of these adverse claims to the Funds, Hachette has a real and  
 13 reasonable fear that distributing the Funds would expose Hachette to multiple claims  
 14 and liabilities. *Id.* ¶ 30. Hachette has a reasonable fear that if it distributes the  
 15 Funds to Windblown as it has done in the past, Young is likely to assert an  
 16 additional claim against Hachette that Windblown has paid him an insufficient  
 17 amount of the Funds. *Id.* Similarly, if Hachette pays to Young the portion of the  
 18 Funds that Young demands, then Windblown, Jacobsen, and Cummings are likely to  
 19 assert a claim against Hachette for some or all of the Funds. *Id.* Hachette further  
 20 expects that similar disputes among Young, Windblown, Jacobsen, and Cummings  
 21 are likely to arise in the future as additional monies become due. *Id.*

22 As noted above, federal interpleader is intended to provide stakeholders with  
 23 precisely the kind of relief Hachette seeks: protection from the vexation of multiple  
 24 lawsuits through resolution of all claims to particular funds in one proceeding.  
 25 *Texas*, 306 U.S. at 406–07; *In re Republic of Philippines*, 309 F.3d at 1153. Given  
 26 the competing claims and the risks of additional actions, Hachette seeks a  
 27  
 28

determination of the proper allocation of the Funds<sup>1</sup> as between Windblown, Jacobsen, Cummings, and Young, and a determination of Hachette's responsibilities with respect to the allocation of the Funds. *Id.* ¶ 7.

**B. Younger Abstention Is Inappropriate In This Case**

Young's argument that the Complaint-In-Interpleader should be stayed or dismissed under the *Younger* abstention doctrine is without merit. The mere existence of a state court contract dispute with some overlapping parties and claims is insufficient to warrant the extraordinary measure of staying or dismissing a case under the *Younger* abstention doctrine. Rather, the *Younger* doctrine has been very narrowly construed, and abstention is only appropriate where the state action involves an interest vital to the operation of the state government. *See, e.g., Mobil Oil*, 772 F.2d at 542. Thus, Courts have determined that abstention under *Younger* is only justified where: (1) there are ongoing state judicial proceedings; (2) the proceedings implicate important state interests; (3) the state proceedings provide the plaintiff with an adequate opportunity to raise federal claims; and (4) the federal court's action would enjoin, or have the practical effect of enjoining, ongoing state court proceedings. *AmerisourceBergen Corp. v. Roden*, 495 F.3d 1143, 1149 (9th Cir. 2007). Because Young cannot satisfy all four of these elements, *Younger* abstention is unavailable.

<sup>1</sup> Young argues that the interpleaded Funds are insufficient to support an interpleader because they are based on Hachette's calculation of "net proceeds" and are only a small subset of the amounts at stake in the State Court Action. Young Mot. at 6. This argument is irrelevant, because so long as the stakeholder interpleads the specific fund or property it holds, interpleader jurisdiction is not affected by its failure to deposit additional amounts claimed to be due. *See Murphy v. Travelers Ins. Co.*, 534 F.2d 1155, 1159 n.2 (5th Cir. 1976). Hachette has never suggested that the interpleaded Funds would cover everything Young claims he is entitled to from previous quarters; rather Hachette has interpleaded the sum that it currently owes under the Hachette-Windblown Agreement in an effort to avoid multiple liabilities with respect to the Funds.

1                   **1. This Interpleader Action Will Resolve Issues That Are Not**  
 2                   **Encompassed Within The State Court Action**

3           Young's abstention arguments are based on the mistaken premise that the  
 4 claims and issues involved in the State Court Action and this Interpleader Action are  
 5 the same. From Young's perspective, the only issue is how much he is paid in  
 6 connection with the Book. Young does not care whether that money comes from  
 7 Windblown or Hachette, and he does not care about the impact or interpretation of  
 8 the Hachette-Windblown Agreement. Thus, in Young's view, all relevant disputes  
 9 can be resolved in the pending State Court Action. This narrow view ignores the  
 10 broader issues facing Hachette. Not only does Hachette face the existing claims  
 11 from Young, but Hachette also faces the very real prospect of a dispute with  
 12 Windblown, Jacobsen and Cummings. If Hachette were to pay to Young the  
 13 Defined Proceeds to which he claims to be entitled, Windblown (and perhaps  
 14 Jacobsen and Cummings) would likely file a new action against Hachette. Because  
 15 Hachette is based in New York, the Hachette-Windblown Agreement was  
 16 negotiated in large part in New York, and many of Hachette's fulfillment services  
 17 took place in New York, it is very possible that such an action would be filed in  
 18 New York and/or based on New York law.<sup>2</sup>

19           The State Court Action does not seek to adjudicate these potential claims  
 20 against Hachette by Windblown, Jacobsen, and Cummings, but instead only raises  
 21 Young's contract claims. Thus, without this Interpleader Action, Hachette would be  
 22 subject to multiple actions in different states with respect to the Funds.

23  
 24  
 25           <sup>2</sup> Importantly, this Court's jurisdiction under the interpleader statute extends  
 26 to potential, as well as actual, claims and thus protects the stakeholder against the  
 27 *possibility* of multiple liabilities, even where only one claim is pending. *Minn. Mut.*  
 28 *Life Ins. Co. v. Ensley*, 174 F.3d 977, 980 (9th Cir. 1999).

## 2. This Case Does Not Implicate A Vital State Interest

Under the *Younger* abstention doctrine, a federal court can only abstain from hearing a civil action if “the State’s interests in the [state court] proceeding are so important that exercise of the federal judicial power would disregard the comity between States and the National Government.” *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 (1987). The goal of *Younger* abstention is to “avoid federal court interference with *uniquely* state interests such as preservation of these states’ peculiar statutes, schemes, and procedures.” *AmerisourceBergen*, 495 F.3d at 1150. Young’s State Court Action does not involve the type of important and uniquely state interest required for *Younger* abstention.

The State Court Action is nothing more than a standard breach of contract case seeking monetary damages that does not implicate, in any way, important and unique state interests. For starters, Young is not even a California resident. Nor is Hachette. And although the Windblown-Young Agreement is governed by California law, the breach of contract, accounting, and declaratory relief claims asserted by Young are the types of claims that are routinely resolved by federal courts every day. Not surprisingly, Young fails to cite a single case in which *Younger* abstention was deemed proper in connection with a standard breach of contract case between private parties. Indeed, if *Younger* abstention applied every time a pending state court action involved a breach of contract claim based on a particular state’s law, *Younger* abstention would apply in virtually every case that touches on state law issues that might be resolved in a pending state court action. Such an expansion of the *Younger* doctrine would eviscerate the long-standing policy that actions can, and usually should, proceed simultaneously in both state and federal courts. *See, e.g., Colorado River*, 424 U.S. at 817 (“the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction”). Moreover, such a broad abstention doctrine

1 would make a mockery of the rule that only circumstances involving important state  
2 interests justify a federal court's refusal to decide a case in deference to the states.

3 Young cites *Pennzoil* as an example of a state's interest warranting *Younger*  
4 abstention where a federal action would interfere with a state court's judgment, but  
5 he does not point to any comparable California judgments, statutes, or procedural  
6 rules with which Hachette's Interpleader Action would interfere. Mot. at 8. In  
7 *Pennzoil*, Texaco commenced a federal action to challenge the constitutionality of a  
8 Texas law and enjoin Pennzoil from executing under that law a significant judgment  
9 entered against Texaco in a Texas state court action. *Pennzoil*, 481 U.S. at 5–6.  
10 The Supreme Court found *Younger* abstention appropriate because the case involved  
11 a challenge to the processes by which Texas compelled compliance with the  
12 judgments of its courts. *Id.* at 13–14. The *Pennzoil* Court cautioned that its  
13 rationale did not imply “that *Younger* abstention is always appropriate whenever a  
14 civil proceeding is pending in the State Court.” *Id.* at 14 n.12. In contrast to the  
15 federal action in *Pennzoil*, Hachette's Interpleader Action does not challenge any  
16 process by which a California court compels compliance with its judgments or  
17 anything even remotely similar.<sup>3</sup>

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18  
19  
20 <sup>3</sup> Likewise, Young has not articulated a state interest in his run-of-the mill  
21 contract case comparable to the interests articulated in the other cases he cites in  
22 support of *Younger* abstention. Mot. at 8–9; see *Ohio Civil Rights Comm'n v.*  
23 *Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986) (state interest in elimination of  
24 prohibiting sex discrimination justified abstention from a § 1983 action against the  
25 Ohio Civil Rights Commission); *Gilbertson v. Albright*, 381 F.3d 965 (9th Cir.  
26 2004) (state interest in enforcing state licensing requirements justified abstention in  
27 a §1983 action against the Oregon State Board of Examiners for Engineering and  
28 Land Surveying). Furthermore, *Ohio Civil Rights Comm'n* and *Gilbertson* are also  
distinguishable because they involve federal actions that seek injunctions against  
ongoing state proceedings. Hachette does not seek an injunction against the State  
Court Action.

1 Finally, the mere potential for conflict in the results of separate adjudications  
 2 does not, without more, warrant staying the exercise of federal jurisdiction, much  
 3 less abdicating federal jurisdiction entirely. *AmerisourceBergen*, 495 F.3d at 1151.  
 4 In particular, it has never been suggested that *Younger* mandates abstention where,  
 5 as here, the federal action merely has partially overlapping monetary claims with an  
 6 ongoing state proceeding between private civil litigants. To the contrary, the Ninth  
 7 Circuit has recognized that actions, like *Young*'s, that seek only monetary damages  
 8 do not ordinarily implicate a vital state interest, even when the government is a party  
 9 to the action. *See Mobil Oil*, 772 F.2d at 542 (*Younger* abstention requires an  
 10 interest vital to the operation of state government, which does not include  
 11 government's interest in money damages).

12 **3. The State Action Does Not Provide Hachette With An**  
 13 **Adequate Opportunity For Relief**

14 This Court can provide Hachette with a more complete interpleader remedy  
 15 than the remedy that would be available in a California state court. In federal  
 16 interpleader actions, the federal court may issue an order restraining all claimants  
 17 from “instituting or prosecuting any proceeding in *any State or United States court*  
 18 affecting the property, instrument or obligation involved in the interpleader action  
 19 until further order of the court.” 28 U.S.C. § 2361 (emphasis added). Thus this  
 20 Court is vested with the power to enjoin any proceedings related to the Funds that  
 21 Windblown, Young, Jacobsen, or Cummings may institute against Hachette  
 22 anywhere in the United States. In contrast, a California state court is only vested  
 23 with the power to restrain all parties to a state interpleader action from “instituting  
 24 or further prosecuting any other proceeding in any court *in this state*.” Cal. Code  
 25 Civ. Proc. § 386(f). Thus if Windblown were to initiate a state or federal proceeding  
 26 related to the Funds against Hachette in New York, where Hachette is based, this  
 27 Court would be able to enjoin such a proceeding, but a California state court would  
 28 be unable to do so.

1                   4.     **This Interpleader Action Would Neither Enjoin, Nor Have**  
 2                             **The Practical Effect Of Enjoining, The State Court Action**

3           Even if the other three requirements for *Younger* abstention could be satisfied  
 4 here (and they are not), abstention “is only appropriate in the narrow category of  
 5 circumstances in which the federal court action would actually enjoin the [ongoing  
 6 state] proceeding, or have the practical effect of doing so.” *AmerisourceBergen*,  
 7 495 F.3d at 1151 (citing *Gilbertson*, 381 F.3d at 978). This case does not fall into  
 8 that category. The Interpleader Action does not seek to enjoin the pending State  
 9 Court Action; rather, the purpose of the Interpleader Action is to determine how to  
 10 allocate the Funds and to protect Hachette against additional claims by Windblown,  
 11 Young, Jacobsen, or Cummings with respect to those Funds.

12           This requirement for *Younger* abstention is not satisfied simply when “the  
 13 relief sought in federal court would, if entertained, likely result in a judgment whose  
 14 preclusive effect would prevent the state court from independently adjudicating the  
 15 issues before it.” *AmerisourceBergen*, 495 F.3d at 1151; *see also Green v. City of*  
 16 *Tucson*, 255 F.3d 1086, 1097 (9th Cir. 2001) (en banc) (“[T]he possibility of a race  
 17 to judgment is inherent in a system of dual sovereigns and, in the absence of  
 18 ‘exceptional’ circumstances, that possibility alone is insufficient to overcome the  
 19 weighty interest in the federal courts exercising their jurisdiction over cases properly  
 20 before them.” (citation omitted)), *overruled on other grounds by Gilbertson*, 381  
 21 F.3d at 968–969. Thus the possibility that the resolution of this Interpleader Action  
 22 might affect any particular claim Young asserts to the same Funds in his State Court  
 23 Action is insufficient to justify *Younger* abstention.

24           Young has failed to show that the *Younger* abstention requirements are met in  
 25 the present action, and thus *Younger* abstention would be improper.  
 26  
 27  
 28

1           **C.    The Colorado River Abstention Doctrine Does Not Justify Staying**  
 2           **Or Dismissing This Action**

3           Where state and federal courts have concurrent jurisdiction over related  
 4 matters, the general rule is that “the pendency of an action in the state court is no bar  
 5 to proceedings concerning the same matter in the Federal court having jurisdiction.”  
 6 *Colorado River*, 424 U.S. at 817. The Supreme Court explained in *Colorado River*  
 7 that because federal courts have a “virtually unflagging obligation” to exercise the  
 8 jurisdiction conferred on them, abstention is appropriate only under exceptional  
 9 circumstances. *Id.*; *see also Snodgrass*, 147 F.3d at 1167–68. This case does not  
 10 present the “exceptional circumstances” justifying abstention under *Colorado River*.

11           **1.    The State Court Action fails to meet the threshold**  
 12           **requirement of being a parallel proceeding**

13           Before even evaluating whether a dismissal of this case is proper under the  
 14 *Colorado River* doctrine, this Court must first determine that the State Court Action  
 15 is a “parallel” or “substantially similar” proceeding to this Interpleader Action.  
 16 *Nakash v. Marciano*, 882 F.2d 1411, 1416 (9th Cir. 1989). A state action is  
 17 “parallel” for abstention purposes where “the two proceedings are essentially the  
 18 same; that is, there is an identity of parties, and the issues and relief sought are the  
 19 same.” *National Union Fire Ins. Co. of Pittsburgh v. Karp*, 108 F.3d 17, 22 (2d Cir.  
 20 1997). Because the State Court Action does not involve all of the parties and issues  
 21 arising from the conflicting claims to the Funds, it does not constitute a parallel or  
 22 substantially similar proceeding for purposes of *Colorado River* abstention.

23           This Interpleader Action involves different parties (Jacobsen and Cummings  
 24 are not parties to the State Court Action), broader issues (including rights and  
 25 responsibilities as between Hachette and Windblown), and seeks different relief than  
 26 the State Court Action. This Interpleader Action is based on Hachette’s fear of  
 27 exposure to competing claims by Windblown, Young, Jacobson, and Cummings—  
 28 some of which may be based on New York law and asserted in New York. In

1 contrast, the State Court Action will only adjudicate Young’s purported claim to  
 2 additional money from Windblown and Hachette in connection with the Book. It  
 3 will not preclude other claims from being filed against Hachette, and it is not likely  
 4 to resolve the potential issues between Windblown, Jacobsen, Cummings, and  
 5 Hachette. Thus, although a resolution of the two actions may involve some of the  
 6 same facts, the issues and relief sought in the two actions differ substantially.

7 **2. Even if the *Colorado River* doctrine applies, the factors weigh**  
 8 **heavily in favor of this Court continuing to exercise**  
 9 **jurisdiction over this Interpleader Action**

10 Even assuming *arguendo* that the State Court Action constitutes a parallel  
 11 proceeding, the factors used to determine the propriety of abstention under the  
 12 *Colorado River* doctrine clearly preclude abstention in this case. The Ninth Circuit  
 13 has identified seven non-exclusive factors that courts must examine in deciding the  
 14 propriety of abstention: (1) whether either court has assumed jurisdiction over a *res*;  
 15 (2) the inconvenience of the federal forum; (3) the desirability of avoiding  
 16 piecemeal litigation; (4) the order in which jurisdiction was obtained by the  
 17 concurrent forums; (5) whether federal law or state law provides the rule of decision  
 18 on the merits; (6) whether the state court proceedings are inadequate to protect the  
 19 federal litigant’s rights; and (7) whether exercising jurisdiction would promote  
 20 forum shopping. *See, e.g., Holder v. Holder*, 305 F.3d 854, 870 (9th Cir. 2002);  
 21 *Colorado River*, 424 U.S. at 818. Because only exceptional circumstances will  
 22 warrant an abdication of jurisdiction, a court must evaluate these factors “with the  
 23 balance heavily weighted in favor of the exercise of jurisdiction.” *Moses H. Cone*  
 24 *Mem’l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 16 (1983).

25 A balancing of those factors here—particularly in light of the heavy weight to  
 26 be accorded in favor of the exercise of this Court’s jurisdiction—requires denial of  
 27 Young’s motion to dismiss, particularly because any doubt should be resolved  
 28 against abstention because “only the clearest of justifications will warrant

dismissal.” *Travelers Indem. Co. v. Madonna*, 914 F.2d 1364, 1369 (9th Cir. 1990) (citing *Colorado River*, 424 U.S. at 819).

(a) **This Court has already assumed jurisdiction over the Funds.**

Although Young contends that the first factor—whether a court has assumed jurisdiction over a *res*—is neutral (Mot. at 10, n.3), this factor actually weighs against abstention to the extent the Funds constitute a *res*. This Court has exercised its jurisdiction over the Funds. On June 3, 2010, this Court ordered that the Funds be deposited with the Clerk of the District Court for the Central District of California.

(b) **The federal forum is convenient**

Young contends that the convenience of the forums is a neutral factor in the present *Colorado River* analysis. Mot. at 10, n.3. The United States District Court for the Central District is at least equally as convenient but likely more convenient than the Ventura County Superior Court. The two courts are approximately 60 miles apart. In *Travelers*, the Ninth Circuit determined that a distance of 200 miles between the federal and state court was “not sufficiently great that this factor point[ed] toward abstention.” 914 F.2d at 1368. Moreover, counsel for all parties are based in Los Angeles near the federal court, and Young is a resident of Oregon. The federal forum is more convenient than the state forum for Hachette since Hachette is a New York-based company that is more familiar with federal procedural rules than local California procedural rules. Furthermore, it would be easier to obtain discovery from key non-party witnesses who reside outside of California in the federal forum than in the state forum. *Compare* Fed. R. Civ. P. 45(b)(2) with Cal. Code Civ. Proc. §§ 2026.010(c) & (f). For example, in order to compel any depositions of, or to obtain documents from, Young’s family or business associates based in Oregon, the parties likely would need to obtain a commission from the Clerk of the Ventura County Superior Court and then initiate a new

1 proceeding in Oregon to cause the issuance of a subpoena. Cal. Code Civ. Proc.  
2 §§ 2026.010(c) & (f).

3 (c) **There are no exceptional circumstances here that**  
4 **justify special concerns about piecemeal litigation**

5 The third *Colorado River* factor considers “whether exceptional  
6 circumstances exist which justify special concern about piecemeal litigation.”  
7 *Travelers*, 914 F.2d at 1369. In order for this factor to weigh in favor of abstention,  
8 there must be “evidence of a strong federal policy that all claims be tried in the state  
9 courts.” *United States v. Morros*, 268 F.3d 695, 706–07 (9th Cir. 2001). For  
10 example, in *Colorado River*, the Supreme Court found that “the clear federal policy  
11 evinced by [the McCarran Amendment, 43 U.S.C. § 666] is the avoidance of  
12 piecemeal adjudication of water rights in a river system.” *Colorado River*, 424 U.S.  
13 at 819. Young has not pointed to any such clear federal policy here.

14 The Ninth Circuit has distinguished cases like *Travelers*, which involve  
15 ordinary contract and tort issues, from cases like *Colorado River*, which implicate  
16 important real property rights and create a substantial danger of inconsistent  
17 judgments. *Travelers*, 914 F.2d at 1369. As in *Travelers*, the State Court Action at  
18 issue here involves contract claims that do not raise special concerns about  
19 piecemeal litigation. Dismissing this Interpleader Action may actually lead to more,  
20 not less, litigation. As noted above, Hachette fears that if this Court does not  
21 determine the proper allocation of the interpleaded Funds, Windblown, Jacobsen,  
22 and Cummings may file an additional lawsuit against Hachette, possibly in New  
23 York, for breach of the Hachette-Windblown Agreement.

24 (d) **The pendency of the State Court Action does not**  
25 **warrant abstention**

26 The fourth *Colorado River* factor considers the order in which jurisdiction  
27 was obtained by the two forums at issue. *Holder*, 305 F.3d at 870. This factor is  
28 generally measured “in terms of how much progress has been made in the two

actions.” *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 21. When Hachette filed its Interpleader Action, both the State Court Action and the Federal Court Action were pending. The State Court Action is still in the early stages: a substitute judge denied Hachette’s and Windblown’s demurrers and motions to strike, but there have been no rulings on the merits of the case and discovery in the State Court Action is in its very early stages. Indeed, the state court has not even set any discovery deadlines or a trial date.

(e) **This Court is fully capable of resolving the legal issues involved in this Interpleader Action**

The fifth factor—whether federal law or state law provides the rule of decision on the merits—does not support abstention. The presence of Young’s California contract claims does not warrant dismissal of this Interpleader Action. The Ninth Circuit has explained that the presence of state law issues may weigh in favor of surrendering jurisdiction “only in some rare circumstances.” *Travelers*, 914 F.2d at 1370 (citation omitted). Claims for breaches of fiduciary duties and breaches of contract are not the type of “rare circumstances” that support abstention because they are the type of “routine issues of state law” the district court is fully capable of deciding. *Id.* This Court is well-equipped to handle any issues related to California contracts in this Interpleader Action. And this court is better-equipped to handle Hachette’s Interpleader Action than the state court is since the state court’s power to enjoin potential proceedings in other states is more limited.

(f) **The State Court Action is inadequate to protect Hachette’s rights**

The sixth factor considers whether the state proceedings are inadequate to protect the federal litigant’s rights. *Holder*, 305 F.3d at 870. As discussed in Section III.B.3, above, Young’s pending State Court Action does not provide Hachette with an adequate opportunity to protect itself against exposure to multiple liabilities stemming from distribution of the Funds. Nevertheless, Young argues

1 that this factor supports abstention because “Hachette can easily file its Interpleader  
 2 in the State Court Action.” Mot. at 11. But Young fails to address the limitations of  
 3 state court interpleader actions as compared to federal interpleader actions. A  
 4 California state court may only enjoin further proceedings related to the interpleaded  
 5 funds within California, whereas the federal court can enjoin such proceedings in  
 6 any state or federal forum. It has been held to be an abuse of discretion to dismiss a  
 7 federal case where, as here, there is any substantial doubt that the state-court  
 8 litigation will be an adequate vehicle for the complete and prompt resolution of the  
 9 issues between the parties. *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 28.

10 **(g) Hachette has not engaged in forum shopping**

11 Hachette filed this Interpleader Action in good faith to resolve the competing  
 12 claims to the Funds efficiently and to protect itself from exposure to multiple claims  
 13 and liabilities. Hachette was forthright in acknowledging the pending State Court  
 14 Action and Federal Court Action at the time it filed this Interpleader Action, and at  
 15 no time has attempted to mislead this Court about the related actions pending here or  
 16 in Ventura County. In determining the appropriate forum to file this Interpleader  
 17 Action, Hachette had to chose between the state forum, in which Young’s claim was  
 18 pending, and the federal forum, in which Jacobsen’s and Cumming’s claims were  
 19 pending. As between the two forums, the federal forum allows far greater  
 20 protection against additional claims to the funds, offers the benefit of nationwide  
 21 jurisdiction, and offers the consistency of the Federal Rules of Civil Procedure.  
 22 Ultimately, Hachette’s choice of forum was justified and appropriate as detailed  
 23 herein, and this factor therefore weighs against abstention.

24 Not surprisingly, Young offers nothing but pure speculation in support of his  
 25 claim of forum shopping. Young’s “theory” that Hachette’s choice of forum was a  
 26 result of “losing several related pleading motions in the State Court” is without  
 27 merit. Mot. at 11. The only motions that have been decided so far were on the  
 28 pleadings and did not reach the merits of the case, the decision was rendered by a

1 judge other than the actual state court judge, and those motions were filed by  
 2 counsel for Windblown on Hachette's behalf, not Hachette's current counsel.  
 3 Moreover, Hachette fully understands that the State Court Action is not going away  
 4 and this Interpleader Action, even if intended as such (which it is not), would not  
 5 allow Hachette to avoid an allegedly unfriendly state forum.

6 As detailed above, an appropriate balancing of all of the *Colorado River*  
 7 factors plainly demonstrates the absence of the "exceptional circumstances"  
 8 necessary to permit abstention. Young's motion to dismiss based on the *Colorado*  
 9 *River* abstention doctrine must therefore be denied.<sup>4</sup>

#### 10 **IV. CONCLUSION**

11 For the foregoing reasons, Plaintiff-in-Interpleader Hachette respectfully  
 12 requests that this court deny Young's motion to dismiss this Interpleader Action.

13 Dated: July 2, 2010

KENDALL BRILL & KLIEGER LLP

14  
 15 By: /s/ Richard B. Kendall

16 Richard B. Kendall

17 Attorneys for Plaintiff-in-Interpleader  
 18  
 19  
 20  
 21  
 22  
 23  
 24  
 25

26 \_\_\_\_\_  
 27 <sup>4</sup> Young has not moved for a stay under either the Younger or Colorado River  
 28 abstention doctrines, and Hachette agrees that a stay of this action is inappropriate.

**PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

***HACHETTE BOOK GROUP, INC. V. WINDBLOWN MEDIA, INC., et al.***  
**USDC Case No. CV10-03534 JFW (JCx)**

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 10100 Santa Monica Blvd., Suite 1725, Los Angeles, California 90067.

On July 2, 2010, I served true copies of the following document described as  
**HACHETTE BOOK GROUP, INC.'S OPPOSITION TO DEFENDANT YOUNG'S  
MOTION TO DISMISS** on the interested parties in this action as follows:

Michael T. Anderson, Esq.  
Donald A. Miller, Esq.  
LOEB & LOEB LLP  
10100 Santa Monica Boulevard, Suite 2200  
Los Angeles, CA 90067-4164  
Telephone: (310) 282-2000  
Facsimile: (310) 282-2200

*Counsel for William Paul Young*

**BY CM/ECF NOTICE OF ELECTRONIC FILING:** I certify that the foregoing document(s) is being filed electronically by using the CM/ECF system. As such, the document will be served electronically on all interested parties whose attorneys are registered CM/ECF users and have consented to electronic service.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 2, 2010, at Los Angeles, California.

/s/ Richard B. Kendall  
Richard B. Kendall

**PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

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Martin D. Singer, Esq.  
Allison Hart Sievers, Esq.  
LAVELY & SINGER  
2049 Century Park East, Suite 2400  
Los Angeles, CA 90067-2906  
Telephone: (310) 556-3501  
Facsimile: (310) 556-3615

*Counsel for Windblown Media, Inc., Wayne  
Jacobsen, and Brad Cummings*

**BY HAND DELIVERY:** I caused such envelope to be delivered by hand to the office of the addressee.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 2, 2010, at Los Angeles, California.

/s/ Richard B. Kendall  
Richard B. Kendall